

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FREDRICK L. KNIGHT,

Petitioner,

Civil No. 04-1607-AC

v.

ORDER

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Respondent.

HAGGERTY, Chief Judge:

Magistrate Judge Acosta issued a Findings and Recommendation [64] recommending that the Amended Petition for Writ of Habeas Corpus [20] and the Supplemental Amended Petition [45] in this matter should be denied, and that Judgment should be entered dismissing this action with prejudice. Objections [65] to portions of the Findings and Recommendation were filed by petitioner. The matter was then referred to this court for review.

When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner filed objections in a timely manner. The court has given the file of this case a *de novo* review, and has also carefully evaluated the Magistrate's Findings and Recommendations, petitioner's objections, and the Record of the case.

This court's *de novo* review has examined each of the four objections summarized in petitioner's Objections. The first two objections are that the Magistrate Judge erred by concluding that petitioner failed to exhaust his ineffective assistance of counsel claims in his case seeking post-conviction relief (PCR) regarding (1) an "inconsistent jury verdicts" argument; and (2) failing to interview Victor Walking Eagle or to call him as a witness. Petitioner's last two objections are that (3) the Magistrate Judge erred in deferring to the state PCR court's decision to deny relief on petitioner's claim that (3) the trial counsel's representation was deficient for failing to adequately object to the "aid and abet" instruction; and (4) the appellate counsel was deficient in failing to assign error to the trial court's "aid and abet" instruction. *See* Findings and Recommendation at 14-16.

This court's *de novo* review has examined each of the four objections presented. The Magistrate Judge correctly determined that petitioner failed to exhaust his argument regarding inconsistent jury verdicts because that argument was not articulated in claim # 10 of his PCR appeals or in any other claim. Although inconsistent verdicts were addressed (primarily by the PCR trial judge), the issue was raised in context to the ineffective assistance of counsel challenge as to the sufficiency of objections to the "aid and abet" instruction. Petitioner did not argue before the PCR court that counsel failed to object to the inconsistent verdicts. Moreover, the Findings and Recommendation concludes correctly that petitioner has made no showing of cause and prejudice to excuse this procedural default, and has not shown that a fundamental miscarriage of justice will result if the claim is not considered. Accordingly, the Findings and Recommendation correctly concluded that habeas relief must be precluded as to petitioner's ineffective assistance of counsel claim regarding a failure to object to inconsistent verdicts.

Petitioner's claim for relief regarding the failure to interview or call Victor Walking Eagle is also precluded. Victor Walking Eagle was not named as an uncalled witness in

petitioner's PCR trial memorandum and was not mentioned in his deposition testimony. The Findings and Recommendation acknowledged that an affidavit from Victor Walking Eagle was included as an exhibit for petitioner in the PCR trial proceeding, but this inclusion was insufficient to fairly present this specific claim to the PCR trial court and in no way establishes that the claim was presented fairly to the state appellate courts. As the Findings and Recommendation reasons, "Petitioner's appellate memoranda did not claim Victor Walking Eagle was an uncalled witness, or that Petitioner was prejudiced by his not being called, or reference his affidavit." Findings and Recommendation at 8. This claim is procedurally defaulted as well, and petitioner has made no showing of cause and prejudice to excuse this procedural default, and has not shown that a fundamental miscarriage of justice will result if the claim is not considered. Accordingly, the Findings and Recommendation correctly concluded that habeas relief is precluded as to petitioner's ineffective assistance of counsel claim regarding a failure to call or interview Victor Walking Eagle.

Petitioner did present an ineffective assistance of counsel claim as to his trial attorney's failure to adequately object to "natural and probable" language within the "aid and abet" instruction. The PCR court considered and rejected this claim.

The Findings and Recommendation correctly concluded that petitioner failed to present clear and convincing evidence that some other instruction would have been proper, or that the instruction given was a misstatement of law. Findings and Recommendation at 13. The deference given to the PCR trial court's factual determinations – and its decision as to this issue – was also proper. Petitioner's claim for habeas relief on the assertion that trial counsel failed to object sufficiently to the "aid and abet" instruction is denied.

Finally, the PCR court also considered and rejected petitioner's claim that his appellate counsel was ineffective by failing to appeal the "aid and abet" instruction. This court concludes

that the Magistrate Judge concluded correctly that petitioner did not meet his burden of showing that appellate counsel's failure to appeal the jury instruction was objectively unreasonable and that there was a reasonable probability that such an argument would have succeeded. The deference given to the PCR trial court's decision to credit the appellate counsel's affidavit and to deny relief as to this issue was also proper. Petitioner's claim for habeas relief on the assertion that appellate counsel failed to object sufficiently to the "aid and abet" instruction is denied.

The Findings and Recommendation is free from error. Petitioner's objections are overruled.

CONCLUSION

Petitioner's objections [65] are OVERRULED. The Findings and Recommendation [64] is ADOPTED as follows: the Amended Petition for Writ of Habeas Corpus [20] and the Supplemental Amended Petition [45] in this matter are denied. Judgment shall be entered dismissing this action.

IT IS SO ORDERED.

Dated this 15 day of August, 2008.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge